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No. 04-1507

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

JUDITH MILLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	PAGE
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	PAGE
Arthur Anderson LLP v. *United States*, No. 04-368, slip op. (U.S. May 31, 2005)	2n
Baker v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972)	3, 7
Branzburg v. *Hayes*, 408 U.S. 665 (1972)	1, 5n
Farr v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975)	5n
Gonzales v. *National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999)	4
In re Grand Jury Proceedings (Scarce v. *United States)*, 5 F.3d 397 (9th Cir. 1993)	5n
In re Grand Jury Subpoena, 955 F.2d 229 (4th Cir. 1992)	9n
Hamdi v. *Rumsfeld*, 124 S. Ct. 2633 (2004)	9-10
Jaffee v. *Redmond*, 518 U.S. 1 (1996)	1-2, 6-8, 8n
In re Letellier, 578 A.2d 722 (Me. 1990)	3
Miller v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980)	4
New York Times Co. v. *Gonzales*, No. 04 Civ 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005)	4
In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004)	3
United States v. *Ahn*, 231 F.3d 26 (D.C. Cir. 2000)	5n
United States v. *Burke*, 700 F.2d 70 (2d Cir. 1983)	3, 4

PAGE

United States v. *Calvert*, 523 F.2d 895 (8th Cir. 1975) 8n

United States v. *Caporale*, 806 F.2d 1487 (11th Cir. 1986) 4

United States v. *Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) 4

United States v. *Fernandez*, 913 F.2d 148 (4th Cir. 1990) 10n

United States v. *Glass*, 133 F.3d 1356 (10th Cir. 1998) 8n

United States v. *LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) 3-4

United States v. *Moussaoui*, 365 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005) 10n

United States v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991) 9n

Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 6-7

In re Williams, 963 F.2d 567 (3d Cir. 1992) 3

Zerilli v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981) 7

Statutes:

Criminal Code

18 U.S.C. app. §§ 1–16 (1982) 10n

18 U.S.C. app. § 6(c)(1) 10n

18 U.S.C. app. §§ 6(c)(1)(A), (B) 10n

18 U.S.C. app. § 6(e)(2) 10n

PAGE

Rules:

Fed. R. Evid.

501 1

1101(c) 4

Constitutional Provisions:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V 1, 8-10

REPLY BRIEF OF PETITIONER

There is a manufactured simplicity to the Special Counsel's brief in opposition to the petition for a writ of certiorari, one obviously driven by an effort to diminish both the importance of the issues presented by this case and the numerous, irreconcilable conflicts among the lower courts as to how those issues should be resolved. Indeed, the Special Counsel's brief offers a new demonstration of the truth of the ancient boxing adage that "you can run but not hide." Try as he does to avoid the reality that the lower federal courts (and state courts) have struggled unsuccessfully and utterly inconsistently to reconcile this Court's opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), with Justice Powell's concurring opinion there; try as he does to ignore this Court's ruling in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the Congressional mandate embodied in Rule 501 and the national consensus that a reporter's privilege should be recognized; and try as he might to belittle petitioner's rights under the Fifth Amendment, the Special Counsel's repeated efforts to avoid the issues raised by this case only reveals more clearly why the petition should be granted.

As the Special Counsel would have it, the Court should not grant the petition because 1) even assuming that a reporter's privilege exists under federal common law—whatever it may be—he has made whatever showing might be required of him to defeat it; 2) there is no conflict among the lower courts—as he redefines the issue—that would warrant this Court's intervention, and; 3) the Due Process clause has nothing to say about the fact that petitioner now faces 18 months of imprisonment on the basis of secret evidence that neither she nor her counsel has been permitted to see or rebut. Almost as an afterthought, the Special Counsel adds that this Court's ruling in *Branzburg* is dispositive of the First Amendment issues that permeate the petition. *See* Opp. Br. at 22. The Court's ruling in *Jaffee* is relegated to a footnote which offers not a word of argument as to whether, in fact, the decision of the court of appeals is consis-

tent with *Jaffee*. *Id.* at 13-14 n.5. When questions of undeniable national import arising out of multiple and directly conflicting rulings of courts of appeals are presented to this Court, they may not be avoided by simply relegating them to the back of a brief in opposition or to a footnote.

ARGUMENT

1. If there is one theme that emerges from the petition in this case, the petition in 04-1508 and the four briefs, *amici curiae*, urging this Court to grant certiorari, it is that these cases present issues of fundamental national importance that are bound to recur with ever greater frequency. The Special Counsel does not dispute this. In fact, he says nothing about it at all. He has no answer to the body of important news reports that could only have been published with information provided by confidential sources.[1] He has no answer to the unrebutted testimony that the public will be deprived of critical information concerning the very functioning of our government if journalists can no longer assure sources that their identities will not be revealed. The Special Counsel has no answers to these matters because there are none.

2. If there is another theme that emerges from the submissions of the petitioners and the four briefs *amici curiae* it is that the state of the law today is in serious disarray in an area where predictability of result is essential. The Special Counsel disagrees, choosing instead simply to redefine the issue so as to permit him to urge that there is actually no conflict among the lower courts at all. According to the Special Counsel, the only

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[1] Recent events cannot help but bring to mind the Watergate revelations and the Enron scandal. Indeed, in its decision of last Tuesday, this Court noted that the Enron investigation was prompted by a report in the Wall Street Journal suggesting improprieties at the company. *See Arthur Andersen LLP* v. *United States*, No. 04-368, slip op. at 2 (U.S. May 31, 2005). The Journal's report was based on information provided by confidential sources. *See Brief, Amici Curiae, of ABC, Inc., et al.* at 11-12. These examples, and the many others cited by the *amici*, only serve to confirm that the use of confidential sources is routine and generally accepted to be a beneficial part of our lives.

issue to focus on is whether there is disagreement among the lower courts that a journalist's privilege should be recognized in the specific context of grand jury proceedings. Having thus framed the issue, the Special Counsel insists that there is no such conflict and proceeds along his way. His framing of the issue is analytically indefensible but, even as he has so framed it, he is incorrect in asserting that there is no debate among the lower courts about it.

The Special Counsel concedes—in a footnote tucked in the back of his brief in opposition—that there is a direct and irreconcilable conflict between the decision below and a decision of a state court of last resort even if the issue to be focused on is as the Special Counsel has defined it. *See* Opp. Br. at 28, n.11 (acknowledging that *In re Letellier*, 578 A.2d 722 (Me. 1990), concluded that the journalist's privilege exists in the grand jury context). Having conceded the conflict, the Special Counsel is left to argue that *Letellier* was "wrongly decided," an argument that is irrelevant at the certiorari stage.

To support his argument that there is no conflict among the lower federal courts, the Special Counsel glosses over or ignores decisions in three circuits that have recognized a reporter's privilege in the context of grand jury proceedings. *See In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (recognizing the need for " 'heightened sensitivity' " to First Amendment interests and a " 'balancing of considerations' " when reporters are called upon to reveal confidential sources); *United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (recognizing "the need to balance First Amendment values even where a reporter is asked to testify before a grand jury") (citing *Baker* v. *F & F Investment*, 470 F.2d 778, 784-85 (2d Cir. 1972); *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (*en banc*) (affirming, by an equally divided court, the district court's decision to quash grand jury subpoenas issued to reporters).

Remarkably, the Special Counsel also chooses to ignore decisions of the First, Second, Third and Eleventh Circuits that have recognized the privilege in the context of criminal trials. *See United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1181 (1st

Cir. 1988); *Burke*, 700 F.2d at 77; *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (applying *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). In ignoring the decisions of these four appellate courts, the Special Counsel implies that there is an analytically sound distinction to be drawn between criminal trials and grand jury proceedings that would permit recognition of the reporter's privilege in one context but not the other. But, as Judge Tatel correctly observed, the question of whether a privilege *exists* cannot turn on the nature of the proceeding in which it may be asserted. App. 55a. The law does not recognize one attorney-client privilege for criminal trials and another (or none at all) for grand jury proceedings. While the application of a privilege may vary depending on the context of the case, the question of whether there *is* a privilege cannot depend on the caption of the case. The Second Circuit recognized this point in *Gonzales* v. *National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), when it observed that while competing First Amendment interests in criminal cases should be given less weight than in civil cases, the privilege nevertheless still exists. *Id.* at 34 n.3 (citing *Burke*, 700 F.2d at 77). Based on that same logic, the Third Circuit in *Cuthbertson* recognized that "the interests of the press that form the foundation of the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial" as opposed to a civil case. 630 F.2d at 147. Just as the privilege should not depend on whether a case is civil or criminal, there is no legally principled reason for its existence to hinge on whether a criminal proceeding is in its investigatory or trial stage. *See New York Times Co.* v. *Gonzales*, No. 04 Civ 7677 (RWS), 2005 WL 427911, at *30, *32 (S.D.N.Y. Mar. 2, 2005) (collecting authorities recognizing reporter's privilege in "all phases of a criminal prosecution" and observing that the "scope of the reporter's privilege may vary depending on the context, but whether there is a qualified privilege rooted in the First Amendment is not dependent on the nature of the case."); Fed. R. Evid. Rule 1101(c). Not surprisingly therefore, the Special Counsel does not even begin

to explain why he, in the course of guiding a grand jury, should be immune from the commands of the First Amendment or federal common law that would apply to a defendant in a federal criminal case who is guaranteed the protections of the Bill of Rights.[2]

3. Having conceded, by his silence, that the issues presented by the petition are of substantial importance and having unsuccessfully attempted to diminish the cacophony of differing views among the lower courts, the Special Counsel turns to his principal argument in opposition to the petition. According to the Special Counsel, all three members of the panel below assumed that there was a privilege under federal common law, assumed that its contours were correctly articulated in Judge Tatel's opinion and nevertheless concluded that the Special Counsel had made a showing sufficient to defeat it. As such, he urges, Ms. Miller cannot possibly prevail in this case and therefore the Court should not hear it.

At the outset, the fact that the Special Counsel expresses confidence that the Court may ultimately rule against the petitioner after it articulates a standard heretofore unarticulated by this Court, is hardly a persuasive ground for urging that the petition should be denied. In any event, any suggestion that the panel below agreed as to the scope of the privilege is demonstrably incorrect. Judge Henderson specifically rejected the test proffered by Judge Tatel insisting that it "lack[ed] analytical rigor,"

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[2] The Ninth Circuit and now the D.C. Circuit have recognized a privilege for reporters subpoenaed in criminal cases but not those subpoenaed by a grand jury. *Compare Farr* v. *Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *with In re Grand Jury Proceedings* (*Scarce* v. *United States*), 5 F.3d 397, 400 (9th Cir. 1993), and *United States* v. *Ahn*, 231 F.3d 26 (D.C. Cir. 2000), *with* App. 1a-77a. Like the Special Counsel, neither court even attempted to provide any rationale for such a distinction except to observe that *Branzburg* arose in the grand jury context. *See* 5 F.3d at 402; App. 41a-42a. Ultimately, the criminal trial/ grand jury distinction is not only unpersuasive but is irreconcilable with *Branzburg* itself, which used the phrases "criminal trial" and "grand jury" interchangeably. *See* 408 U.S. at 690-91.

(App. 36a) and required a balancing that "may prove unproductive." *Id.* at 37a. "Moreover," Judge Henderson wrote, "to attempt to establish the contours of a reporter's privilege here would tend, unnecessarily, to leave a future panel less maneuverability in a case that might require just that to achieve justice." *Id.* at 38a. For his part, Judge Sentelle rejected the concept of a reporter's privilege outright going only so far as to say that he did not "disagree" that the Special Counsel had submitted sufficient proof to defeat any privilege that might obtain. *Id.* at 22a.

This is not mere word mincing. It is of little comfort to Ms. Miller, the 42 news organizations and reporters' groups who submitted briefs, *amici curiae*, to this Court and to the many other reporters who cover sensitive issues of national importance on a daily basis that a future panel of the court of appeals is left with the "maneuverability" to decide whether and to what extent a journalist has any right not to reveal her confidential sources when the government demands that she do so. Nor is it any answer to the 34 states and the District of Columbia who have joined in the extraordinary brief, *amici curiae*, seeking this Court's guidance on an issue that, they persuasively demonstrate, has seriously undermined the application of their own state laws.[3]

As this Court has made clear, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981); *Jaffee*, 518 U.S. at 18 ("[I]f the purpose of the privilege is to be served,

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[3] One reason the brief, *amici curiae*, is of such significance is because it is so counter-intuitive. Submitted by a clear majority of state attorneys-general, the very entities that may be thought to be deprived of the evidence that state privileges protect, the brief nonetheless urges that since 49 states have recognized such a journalist's privilege and since the absence of federal protection "undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them," "some form of a reporter's privilege grounded in federal common law is appropriate" and should be embodied in law by this Court. *See Brief, Amici Curiae, of the States of Oklahoma, et al.* at 3, 6.

the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.' ") (citing *Upjohn*, 449 U.S. at 393). In upholding the reporter's privilege, courts of appeals have also stressed the importance—for both journalists and their sources—of having a predictable rule of law. *See, e.g., Zerilli* v. *Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Baker*, 470 F.2d at 782-83.

4. The Special Counsel seeks to justify his confidence in his case by repeated reliance on the conclusions—whatever they may be—set forth in the eight secret pages of Judge Tatel's concurring opinion, which we are told provide the basis upon which even a valid claim of privilege by Ms. Miller is to be rejected and her incarceration for up to 18 months sustained. The Special Counsel does not take issue with the notion that jailing someone based upon judicial findings never shown to her and to which she has no opportunity to respond is unprecedented in our history. Nonetheless, since any privilege for journalists to protect the identity of their confidential sources is supposedly overcome "on the facts of the case" by an *ex parte*, *in camera* submission made by the Special Counsel to the district court, not a word of which has been made available in any fashion even to Ms. Miller's counsel, the Special Counsel maintains that it is of no moment whether any privilege exists at all.

This simply misses the point. For one thing, in a situation in which the scope of any journalist's privilege has yet to be defined by this Court, it can hardly be said that *whatever* showing the Special Counsel has proffered meets the as-yet-unspecified test. If, for example, this Court were to follow its reasoning in *Jaffee* in this case, it would be led to establish a privilege, the "full contours" of which would be fleshed out over time but which would not involve a constant *ad hoc* "balancing component" which could, by its nature, "eviscerate the effectiveness of the privilege" 518 U.S. at 18, 17.[4] A number of the 34 states

[4] The Special Counsel's repeated apparently pejorative use of the word "absolute" to characterize such a privilege is a misnomer, just as it

that joined the brief, *amici curiae*, urging the Court to grant the writ in this case, provide just such protection.[5]

5. Even if any First Amendment or federal common law-rooted protection articulated by this Court involved some sort of *ad hoc* balancing of the sort rejected in *Jaffee*, the position of the Special Counsel that there is no due process right of Ms. Miller to see (or for her counsel to see) and respond to the submission made by the Special Counsel that persuaded the court of appeals that any privilege should be deemed overcome cannot be deemed consistent with core due process principles.[6] The

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would be with respect to the privileges afforded to psychotherapists or, say, lawyers. While *Jaffee* does not specify what limits there may be on the former common law privilege, there is no reason to believe that psychotherapists will be held privileged not to reveal information about future crimes of their patients of which they are advised. *Jaffee*, 518 U.S. at 18 n.19 ("[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist"); *United States* v. *Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998) (observing that a psychotherapist may testify about a threat made by a patient if "the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm . . . when the disclosure was made"). As for lawyers, there is no attorney client protection when the crime fraud exception is deemed applicable. *See, e.g., United States v. Calvert*, 523 F.2d 895, 909 (8th Cir. 1975) ("[A]t common law, it is settled that confidential communications from client to attorney are not privileged if the court concludes the evidence warrants a finding that the communications were made for the purpose of obtaining aid in the commission of future criminal acts."). Similar exceptions may yet be articulated for journalists.

[5] Fourteen states, the District of Columbia and one territory have recognized a *Jaffee*-like privilege for journalists to protect confidential sources in an adjudicative setting. They are Alabama, Arizona, California, Delaware, the District of Columbia, Guam, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oregon and Pennsylvania. *See* Petition at 23 n.21.

[6] In light of the Special Counsel's thus far successful efforts to prevent petitioner and her counsel from seeing the materials he filed with the district court (or even summaries of them), it is ironic, at best, for him

conclusion of this Court in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2651 (2004), is telling: if "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short" for enemy combatants, it is not too much to ask at least the same for American journalists. It is no answer for the Special Counsel to treat Ms. Miller as if she had served some sort of punishing FOIA request or a demand for "extensive discovery." Opp. Br. at 19. She seeks no such thing, only the opportunity for her counsel to review the materials the Special Counsel furnished to the district court in an effort to persuade it to hold Ms. Miller in contempt.[7] Nor can the Special Counsel distinguish *Hamdi*, other cases of this Court, and contrary rulings of the Second and Ninth Circuits by asserting that in all such cases "the potential consequences of the litigant's conduct was the central issue in the case," while here "petitioners faced a coercive penalty of civil contempt because they refused to obey a lawful order to give evidence . . . ." Opp. Br. at 18. Here, of course, the very question before the Court is whether the order directed at the petitioners was or was not "lawful." To deprive petitioners of any meaningful opportunity to argue that the order was not lawful by depriving their lawyers of the opportunity even to be apprised of what documents the Special Counsel has filed with the district court to demonstrate the order's legality is at least as

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to argue that petitioner should be faulted for not urging that "the court of appeals relied on erroneous factual findings or misapplied the assumed privilege to the facts of this case." Opp. Br. at 15-16. There are no factual findings that petitioner or her attorneys have been permitted to see.

[7] For the same reason, the Special Counsel's reliance on *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), is misplaced. No contempt proceedings were involved there. Equally as important, the Court did not consider a First Amendment-based challenge to the subpoenas at issue in *R. Enterprises*; indeed it suggested that if First Amendment interests were implicated, a different analysis might obtain. *See id.* at 303; *id.* at 306-07 (Stevens, J., concurring). *See also In re Grand Jury Subpoena*, 955 F.2d 229, 233-34 (4th Cir. 1992) (on remand).

violative of the Due Process Clause as was the case in *Hamdi* and all other cases cited.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] This principle is reflected in the Classified Information Protection Act ("CIPA") itself, which establishes procedures for the use of classified information in criminal trials. 18 U.S.C. app. §§ 1–16. (1982). Under CIPA, if classified information is relevant, admissible and " 'helpful' " to a defendant's case or is " 'essential to a fair determination of a cause,' " courts will require the government, at a minimum, to provide a summary of the classified information or a statement admitting facts that the information would tend to prove. *United States* v. *Moussaoui*, 365 F.3d 292, 308 (4th Cir. 2004) (citation omitted), *cert. denied*, 125 S. Ct. 1670 (2005); 18 U.S.C. app. §§ 6(c)(1)(A) and (B). If those methods do not provide the defendant with "substantially the same ability to make his defense as would disclosure of the specified classified information," courts are authorized under CIPA to dismiss the defendant's indictment. *Id.* at §§ 6(c)(1) and 6(e)(2); *see also United States* v. *Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) ("Although CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence.").